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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-69

Norman Wayne Journey ..... *Petitioner*

Vs.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of Arkansas is reported at ***Journey*** v. ***State of Arkansas***, 257 Ark. 1007, 521 S.W. 2d 210 (April 14, 1975), and is reprinted in petitioner's brief.

JURISDICTION

The requirements for jurisdiction are adequately set forth in the Petition.

QUESTION PRESENTED

WHETHER AN ALLEGED DOUBLE JEOPARDY VIOLATION IS COGNIZABLE WHERE PETITIONER HAS BEEN SUBJECTED TO PROSECUTION BY FEDERAL AND STATE AUTHORITIES FOR GENERICALLY DIFFERENT CRIMES ARISING OUT OF A COURSE OF CONDUCT.

STATEMENT

The petitioner, Norman Wayne Journey, was charged with the commission of the offense of Interstate Transportation of Stolen Property, 18 U.S.C.A. §2314, in the United States District Court for the Eastern District of Missouri for the alleged transportation of stolen jewelry from St. Louis, Missouri, to Little Rock, Arkansas. Pursuant to a jury trial petitioner was found not guilty and a judgment of acquittal was entered to that effect on June 7, 1973.

Subsequently, upon information filed in Pulaski County Circuit Court, Arkansas, on August 3, 1973, the petitioner was charged with possession of stolen property, Ark. Stat. Ann. §41-3938 (Repl. 1964). Upon pleading to the charges, petitioner interposed the defense of former acquittal by way of motion to dismiss. The Circuit Court denied petitioner's motion and upon appeal from that order, the Supreme Court of Arkansas affirmed the trial court's denial by written opinion on April 14, 1975. The petitioner's appeal to the Arkansas Supreme Court was limited to the allegation of a former acquittal violation in disregard of the Arkansas statutory scheme and did not encompass the broader constitutional issue now being pursued by the

petitioner in this Court. The petitioner brings this Writ of Certiorari in response to the ruling by the Arkansas Supreme Court.

The stolen property at issue in each of the separate prosecutions was the same jewelry but the respective prosecutions hinged upon separate and distinct dealings with the property by the petitioner according to Federal and State statutes.

ARGUMENT IN SUPPORT OF DENYING THE WRIT

The circumstances of the present case do not present any issues of constitutional magnitude and this Court should not retreat from or modify the long sanctioned principle of possible punishment by two sovereigns, Federal and State. The circumstances of this case, further, do not support a finding of double jeopardy violative of the Fifth Amendment to the United States Constitution as proof of one offense would not prove the other.

A.

This Court has established and adhered to the principle that "[e]very citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both . . . ." ***Moore*** v. ***Illinois*** (US) 14 How. 13, 19, 14 L.Ed. 306 (1852).

This holding has been undisturbed by this Court since that

time and has been reiterated numerous times. ***Abbate*** v. ***United States***, 359 U.S. 187, 3 L.Ed. 2d 729, 79 S.Ct. 666 (1959); ***Bartkus*** v. ***Illinois***, 359 U.S. 121, 3 L.Ed. 2d 684, 79 S.Ct. 676, reh. den., 360 U.S. 907, 3 L.Ed. 2d 1258, 79 S.Ct. 1283 (1959), and cases cited in each. The latter case is most appropriate to a consideration of the present case by virtue of the sequence of prosecutions, Federal and then State. [There are distinguishing factors which will be discussed in the succeeding portion of this argument.] Further, in ***Bartkus***, as here, the alleged violation was one of first prosecution by federal authorities resulting in acquittal which was followed closely by a State initiated prosecution. This Court there stated,

> "It would be in derogation of our federal system to displace the reserved power of states over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the states." 359 U.S. at 137, 3 L.Ed. 2d at 694.

Respondent asserts that this principle, long sanctioned and oft repeated, has continuing viability and is ample to deny petitioner's request for this Court's consideration because the State of Arkansas has the reserved power to prosecute offenses in derogation of its criminal statutes and a former prosecution by the federal government does not bar such power.

B.

This Court, too, should decline the petitioner's request for consideration as the facts of the case do not present a cognizable issue of double jeopardy in any forum. The appellant was tried and acquitted under federal prosecution for the commission of the crime of interstate transportation of stolen property, 18

U.S.C.A. § 2314, in Federal District Court, and was subsequently charged in State court for the crime of possession of stolen property, *Ark. Stat. Ann.* § 41-3938 (Repl. 1964). Under the guidelines established for an evaluation and determination of an alleged violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution, the petitioner is entitled to no relief.

The rule of collateral estoppel established in *Cromwell* v. *County of Sac*, 94 U.S. 351, 24 L. Ed. 195 (1877), and the criminal application of that doctrine in *Ashe* v. *Swenson*, 397 U.S. 436, 25 L. Ed. 469, 90 S. Ct. 1189 (1970), demonstrate the lack of merit in petitioner's double jeopardy contention. This Court defined collateral estoppel in *Ashe*, supra, stating:

> " 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 433, 25 L. Ed. 2d at 475.

Although this is not a case of multiple litigation between the same parties as articulated in the preceeding argument, the rule is nonetheless inapplicable. The issues of ultimate fact determined in the Federal forum did not encompass the same ultimate facts to be determined in the State forum. In the first litigation, the requisite elements of proof were (1) that the petitioner had transported or had caused the transportation of stolen articles in interstate or foreign commerce; (2) that the petitioner did so wilfully and with knowledge that the articles were stolen; and (3) that the value of the stolen articles was in

excess of five thousand ($5,000.00) dollars. 18 U.S.C.A. § 2314. However, in the initiated second litigation, the requisite elements of proof are only (1) that the petitioner have actual possession of stolen property; (2) which he knows to be stolen and (3) which he intends to retain from the true owner's possession. The proof of value goes only to the nature of the offense, felony or misdemeanor. *Ark. Stat. Ann.* § 41-3938 (Repl. 1964). It is obvious from these outlines of proof that possession of the property is not required under the Federal statute for conviction, but it is critical to the State litigation; and conversely, interstate transportation is not required under the State scheme, but it is critical to the federal scheme. The elements of scienter and value are common to many criminal offenses and are certainly not preeminent considerations in the application of collateral estoppel. Therefore, the petitioner is not entitled to relief under the standard articulated as the ultimate facts determined in the valid and final federal judgment are not the same as those necessary in the State prosecution. Neither would the pleadings, critical evidence or charges have been the same. It is manifest from the foregoing that the Federal jury "could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration;" e.g., failure of proof of interstate transportation or of causing the interstate transportation. *Ashe*, supra, 397 U.S. at 444. The petitioner's contention fails to support a finding of double jeopardy.

CONCLUSION

This Court should continue to adhere to the principle that a criminal defendant, like any citizen, owes an allegiance to two sovereigns; and that his criminal activities may subject him to the laws and penalties of each. This Court, too, should refrain from any variation in that principle based upon the record in this case as it fails to meet even a showing of double jeopardy in a single forum by the established principle of collateral estoppel. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gary Isbell, Assistant Attorney General, do hereby certify that I have forwarded two (2) copies of the Brief for Respondent in Opposition to Mr. Gene Worsham, 207 West Second Street, Little Rock, Arkansas 72201, by placing same in the United States Mail, postage prepaid, this 25th day of August, 1975.

GARY ISBELL
Assistant Attorney General